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13 Attorneys for Defendant/Counter-Plaintiff
14 EXCELSIOR MEDICAL CORPORATION

15 UNITED STATES DISTRICT COURT

16 SOUTHERN DISTRICT OF CALIFORNIA

17 IVERA MEDICAL CORPORATION,

18 Plaintiff,

19 v.

20 EXCELSIOR MEDICAL
CORPORATION,

21 Defendant.

Case No. 3:11-cv-01115-H-JMA

**DEFENDANT EXCELSIOR MEDICAL
CORPORATION'S ANSWER AND
COUNTERCLAIMS**

JURY TRIAL DEMANDED

23 EXCELSIOR MEDICAL
CORPORATION,

24 Counter-Plaintiff,

25 v.

26 IVERA MEDICAL CORPORATION,

27 Counter-Defendant.
28

1 Defendant Excelsior Medical Corporation (“Excelsior”) answers the complaint of
2 plaintiff Ivera Medical Corporation (“Ivera”) and asserts certain counterclaims as follows:

3 **PARTIES**

4 1. Excelsior lacks information sufficient to form a belief regarding the
5 allegation that Ivera is a California corporation, and therefore denies the same. Upon
6 information and belief, the address given by Ivera as its “principal place of business” is
7 UPS Store #0866. Excelsior denies that this address is Ivera’s principal place of business.

8 2. Excelsior admits the allegations set forth in this paragraph and additionally
9 states that Excelsior is a Delaware corporation.

10 **JURISDICTION**

11 3. Denied.

12 4. Denied.

13 **BACKGROUND**

14 5. Excelsior lacks information sufficient to form a belief regarding the
15 allegations in this paragraph and therefore denies the same.

16 6. Excelsior admits that the United States Patent and Trademark Office issued
17 U.S. Patent No. 7,780,794 B2 (the “’794 patent”), entitled “Medical Implement Cleaning
18 Device,” on August 24, 2010 and that a copy of the ’794 patent is attached to the
19 Complaint as Exhibit A. Except as expressly admitted, Excelsior lacks information
20 sufficient to form a belief regarding the remaining allegations in this paragraph and
21 therefore denies the same.

22 7. Excelsior lacks information sufficient to form a belief regarding the
23 allegations in this paragraph and therefore denies the same.

24 8. Excelsior admits that it sells a product under the trademark SwabCap within
25 the United States, but denies the remaining allegations of this paragraph.

FIRST CAUSE OF ACTION

COUNT I

(INFRINGEMENT OF THE '794 PATENT)

9. Excelsior incorporates herein by reference each and every response to paragraphs 1 through 8 above, as though set forth here at length.

10. Denied.

11. Denied.

12. Denied.

13. Denied.

PRAYER FOR RELIEF

Excelsior denies that Ivera entitled to any of the relief requested in its Prayer for Relief and denies any allegations therein.

A. Excelsior denies that Ivera is entitled to the relief requested in this paragraph.

B. Excelsior denies that Ivera is entitled to the relief requested in this paragraph.

C. Excelsior denies that Ivera is entitled to the relief requested in this paragraph.

D. Excelsior denies that Ivera is entitled to the relief requested in this paragraph.

E. Excelsior denies that Ivera is entitled to the relief requested in this paragraph.

F. Excelsior denies that Ivera is entitled to the relief requested in this paragraph.

G. Excelsior denies that Ivera is entitled to the relief requested in this paragraph.

H. Excelsior denies that Ivera is entitled to the relief requested in this paragraph.

I. Excelsior denies that Ivera is entitled to the relief requested in this paragraph.

AFFIRMATIVE DEFENSES

Excelsior asserts the following affirmative defenses:

FIRST AFFIRMATIVE DEFENSE

1. Excelsior has not and is not infringing, either literally or under the Doctrine of Equivalents, any valid and enforceable claim of the '794 patent.

SECOND AFFIRMATIVE DEFENSE

2. Any damages are limited by 35 U.S.C. §§ 286 and 287.

1 **THIRD AFFIRMATIVE DEFENSE**

2 3. Ivera's claims are barred by the equitable doctrines of waiver, estoppel,
3 laches, and unclean hands.

4 **EXCELSIOR'S PRAYER FOR RELIEF**

5 WHEREFORE, Excelsior respectfully requests that the Court enter judgment
6 against Ivera to include:

7 A. Entering an order dismissing Ivera's Complaint, with prejudice, and denying
8 Ivera the relief requested in the Complaint and any relief whatsoever.

9 B. Enter judgment that Excelsior does not infringe, either directly or under the
10 Doctrine of Equivalents, any valid and enforceable claim of the '794 patent.

11 C. Enter judgment that one or more claims of the '794 patent are invalid.

12 D. Awarding Excelsior all other such relief as the Court may deem just
13 and proper.

14 **COUNTERCLAIMS**

15 Counter-Plaintiff Excelsior Medical Corp. ("Excelsior") for its Counterclaims
16 against Counter-Defendant Ivera Medical Corp. ("Ivera") hereby alleges as follows:

17 **PARTIES**

18 1. Excelsior is a Delaware corporation with its principal place of business at
19 1933 Heck Avenue, Neptune, New Jersey 07753.

20 2. Ivera alleges that it is a California corporation with its principal place of
21 business at 3525 Del Mar Heights Road, Suite 430, San Diego, California, 92130.

22 **JURISDICTION AND VENUE**

23 3. This Court has jurisdiction over the subject matter of this action pursuant to
24 28 U.S.C. §§ 1331 and 1338(a) because the action involves claims arising under the Patent
25 Laws of the United States, 35 U.S.C. § 1 *et seq.*

26 4. This Court may declare the rights and other legal relations of the parties
27 pursuant to 28 U.S.C. §§ 2201 and 2202 because this is a case of actual controversy within
28 the Court's jurisdiction.

13. On or about May 20, 2011, prior to dismissing the Texas Action, Ivera filed the immediate action for patent infringement against Excelsior in this District (the “Immediate Action”).

14. In its complaint in the Immediate Action, Ivera again alleges that Excelsior's SwabCap products infringe the '794 patent.

15. Accordingly, there is an actual, substantial and continuing justiciable case and controversy between Excelsior and Ivera regarding the '794 patent, over which this Court can and should exercise jurisdiction, and declare the rights of the parties. Excelsior is therefore entitled to bring and maintain these counterclaims for declaratory judgment. 28 U.S.C. §§ 2201.

COUNT I

(Declaratory Judgment of Non-Infringement of the '794 Patent)

16. Excelsior incorporates the allegations of paragraphs 1-15 as if set forth herein in full.

17. Excelsior has not and is not infringing, either literally or under the Doctrine of Equivalents, any valid and enforceable claim of the '794 patent.

18. Excelsior is therefore entitled to a declaratory judgment that it has not and is not infringing any valid and enforceable claim of the '794 patent.

COUNT II

(Declaratory Judgment Of Invalidity of the '794 Patent)

19. Excelsior incorporates the allegations of paragraphs 1-18 as if set forth herein in full.

20. One or more of the claims of the '794 patent are invalid for failure to meet one or more of the statutory requirements for patentability set forth in 35 U.S.C. §§ 101 *et seq.*

21. Excelsior is therefore entitled to a declaratory judgment that one or more of the claims of the '794 patent are invalid.

WHEREFORE, Excelsior respectfully requests that the Court enter judgment against Ivera to include:

A. Declaring that Excelsior has not infringed, either directly or under the Doctrine of Equivalents, any valid and enforceable claim of the '794 patent;

B. Declaring that one or more of the claims of the '794 patent are invalid; and

C. Awarding Excelsior all other such relief as the Court may deem just and proper.

Defendant/Counter-Plaintiff Excelsior hereby demands a jury trial as to all issues that are so triable.

Dated: June 17, 2011

Respectfully submitted,

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By: *s/ Robert S. Gerber*

ROBERT S. GERBER

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EXCELSIOR MEDICAL CORPORATION
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served on June 17, 2011 to all counsel who are deemed to have consented to electronic service via the Court's CM/ECF system per Civil Local Rule 5.4. Any other counsel of record will be served by electronic mail, facsimile and/or overnight delivery.

s/ Robert S. Gerber

ROBERT S. GERBER (SBN 137961)

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